

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

DEON FREDRICK SMITH,

*Petitioner,*

vs.

ANDREW DUNCAN,,

*Respondent.*

2:13-cv-01526-GMN-GWF

ORDER

This habeas matter by a federal pretrial detainee held within the District comes before the Court for initial review. Petitioner seeks the dismissal of the ongoing federal prosecution against him in this Court in No. 2:11-cr-00442-GMN-GWF.

The papers presented are subject to substantial defects.

First, petitioner did not properly commence the action by either paying the \$5.00 filing fee or filing an application to proceed *in forma pauperis* on the Court's required form with all required attachments. Under Local Rule LSR 1-1, a petitioner must use the Court's required pauper application form. Moreover, under Local Rule LSR 1-2, he must attach both a financial certificate executed by an authorized institutional officer and a statement of his inmate account statement for the prior six months. Petitioner did not use the required form, and he did not attach a copy of an executed financial certificate along with his inmate account statement.

Second, petitioner did not name a proper respondent. Petitioner must name his immediate physical custodian as respondent in order to properly invoke the Court's habeas jurisdiction. *E.g., Rumsfeld v. Padilla*, 542 U.S. 426 (2004). He instead named the Assistant United States Attorney assigned to his criminal case. Naming the prosecutor in his case is not sufficient to sustain jurisdiction.

Due to these multiple substantial defects, the petition in this improperly-commenced action will be dismissed without prejudice. Given that petitioner is a federal pretrial detainee,

1 it does not appear that a dismissal without prejudice would result in a promptly-filed new  
2 action being untimely or cause other substantial prejudice.

3 IT THEREFORE IS ORDERED that the application (#1) to proceed *in forma pauperis*  
4 is DENIED without prejudice and that the petition shall be DISMISSED without prejudice to  
5 the filing of a new petition and pauper application with all required financial attachments in a  
6 new civil action under a new docket number.

7 IT FURTHER IS ORDERED that a certificate of appealability is DENIED, as jurists of  
8 reason would not find the dismissal of this improperly-commenced action to be either  
9 debatable or incorrect, given the absence of any substantial prejudice to petitioner from the  
10 dismissal without prejudice.

11 The Clerk of Court shall SEND petitioner with this order two copies each of an AO 242  
12 habeas petition form (available on the J-Net) and a prisoner pauper application along with one  
13 copy of the instructions for the pauper form and of the papers submitted in this action.

14 The Clerk further shall correct the cross-reference on the docket sheet to the criminal  
15 matter identified previously in this order. Petitioner listed an incorrect docket number in the  
16 petition.

17 The Clerk shall enter final judgment accordingly, dismissing this action without  
18 prejudice.

19 DATED this 23rd day of August, 2013.

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23 Gloria M. Navarro  
24 United States District Judge  
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